Editor's note: Appealed -- aff'd, sub nom. Rawls v. U.S., Civ. No. 73-19 PCT WPC (D. Ariz. April 22, 1975), aff'd, Nos. 76-1604, 76-1123 (9th Cir. Jan. 6, 1978), 566 F.2d 1373

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
v.
EMMA MAE COX

UNITED STATES OF AMERICA
v.
EMMA MAE COX AND M. D. RAWLS AND EDITH RAWLS

IBLA 70-103 Decided January 31, 1972

Appeal from decision (Arizona Contests Nos. A-10597, A-03470) of Office of Appeals and Hearings, Bureau of Land Management, holding seven mining claims null and void and dismissing a complaint against another.

Affirmed.

Mining Claims: Common Varieties of Minerals

A deposit of building stone which is of widespread occurrence and used for decorative construction because it is found in a variety of colors and splits easily but does not command a higher price than that at which comparable deposits are sold does not have a special and unique value; therefore it is a common variety of stone not subject to mining location after July 23, 1955.

Mining Claims: Common Varieties of Minerals -- Mining Claims: Discovery

Mining claims located for a common variety of building stone are properly declared invalid for lack of discovery where the evidence shows that at most small quantities of stone may have been sold at so inconsequential a profit, if any, prior to July 23, 1955, that a prudent man would not have been justified in developing the claims prior to July 23, 1955.

Mining Claims: Lands Subject To

Lands acquired for national forests under the General Exchange Act of March 20, 1922, have the status of public lands of the United States and are therefore subject to entry under the general mining laws.

Mining Claims: Location

A mining claimant bears the responsibility of maintaining markings for mining claims and discovery points within them.

APPEARANCES: Elmer C. Coker for Emma Mae Cox and M. D. and Edith Rawls; Phillip E. Von Ammon for the Atchison, Topeka & Santa Fe Railway Company;
Richard L. Fowler for the United States.

OPINION BY MR. RITVO

The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as Santa Fe), Emma Mae Cox, and M. D. And Edith Rawls have respectively appealed to the Secretary of the Interior from a decision dated September 26, 1969, of the office of Appeals and Hearings, Bureau of Land Management. Mrs. Cox has appealed from so much of that decision as affirmed a June 27, 1968, decision of a hearing examiner declaring the Cucamunga X mining claim null and void. The Rawls have appealed from so much of that decision as affirmed the decision of the hearing examiner declaring the White Rock No. 2, the Lucky Seven, and the Mystery claims null and void, and reversed the hearing examiner's decision dismissing the United States complaint against the White Rock No. 1 and Santa Fe's complaint against the Cuervo and declared these claims to be null and void. Santa Fe has appealed from so much of the bureau's decision as dismissed its complaint against the Blue Jay.

The contested claims, which are within the Kaibab National Forest, were all located for deposits of flagstone. They lie in a line running east to west as follows: Cucamunga X, Blue Bird (which was not contested) adjoining it to the south, then the Blue Jay, Cuervo, Lucky Seven, White Rock No. 2, Mystery to the south of it, and White Rock No. 1. Pursuant to a special use permit issued by the Forest Service on August 19, 1959, Santa Fe constructed a railway line through all the claims except the Mystery. Mrs. Cox claims the Blue Bird and the Cucamunga X. All the others are held by the Rawls.

The decisions of the hearing examiner and the bureau fully set out the facts and the applicable law.

The claims were located for their deposits of sandstone, which are found in varied colors and have the physical characteristic of splitting readily into flagstones. They are used for ornamental stonework.

The principles controlling the disposition of mining claims located for building stone are well established. The Act of August 4, 1892, 30 U.S.C. § 161 (1970) authorizes a location of building stone claims on "lands that are chiefly valuable for building stone." The Act of July 23, 1955, provides in § 3 as amended, 30 U.S.C. § 611 (1970) that:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws . . . . "Common varieties" . . . does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value . . .

The Act of July 23, 1955, supra, removed common varieties of building stone from location under the mining laws. Thus, if the stone is a common variety, the appellants, in order to satisfy the requirements of discovery, must show that as of July 23, 1955, the deposits in each claim could have been extracted, removed and marketed at a profit. Marketability can be demonstrated by favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand for the material, that is, a demand that existed when the deposit was subject to location. United States v. Coleman, 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Frank and Wanita Melluzzo, 76 I.D. 181 (1969), set aside and remanded on other grounds, 77 I.D. 172 (1970). If the stone is an uncommon variety it remains subject to location and the date of discovery can be after July 23, 1955. In order to determine whether a deposit of stone or other material has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. It must then be shown that the material under consideration has some property which gives it a value for purposes for which other materials are not suited or, if the material is to be used for the same purposes as other materials of common occurrence, that it possesses some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the marketplace. United States v. Paul M. Thomas et al., 78 I.D. 5 (1971).

The hearing examiner and the Bureau of Land Management agreed that there are extensive deposits of flagstone in the immediate area of the claims and in Arizona and adjoining states, that there is and

has been a market for such flagstone, that there are numerous quarries in the area of the claims, that there are extensive deposits of flagstone on the claims, that no or very little flagstone was removed from the White Rock No. 2, Mystery, Lucky Seven or Cucamunga X claims prior to July 23, 1955, that a small amount had been removed from the Cuervo and less from the White Rock No. 1 and a substantial amount from the Blue Jay (which was not challenged for lack of discovery by either contestant). The hearing examiner and the bureau agreed that the flagstone was a common variety of stone not subject to mineral location after July 23, 1955, and that there had been no discovery of a valuable mineral deposit within the limits of the White Rock No. 2, Lucky Seven, Cucamunga X or Mystery claims before July 23, 1955. They further agreed that Mrs. Cox had not borne the burden of showing that the claims were positioned as she asserted and that the quarry on the uncontested Blue Bird did not extend into the Cucamunga X. 1/ They also agreed that the Mystery claim had not been located until after July 23, 1955. Finally, they agreed that Santa Fe's contention that lands acquired by the United States pursuant to the General Exchange Act of March 20, 1922, 16 U.S.C. §§ 485, 486 (1970), as these had been, were not subject to mineral location, was unsound, citing Solicitor's Opinion, M-36421 (February 18, 1957). We agree with these conclusions.

They disagreed only as to the Cuervo and the White Rock No. 1 claims; the hearing examiner finding them valid, and the Bureau of Land Management reversing and holding them invalid for lack of a timely mineral discovery.

The Bureau of Land Management set out the pertinent considerations as follows:

> Concerning the White Rock No. 1 and the Cuervo claims, the aerial photograph taken on June 11, 1955, does show a very small quarry on each claim, and aerial photographs taken in subsequent years show these quarries increase in area. The Forest Service mining engineer is of the opinion that there has been sufficient development on these claims by the time of the hearing to show there is an adequate supply of rock to support profitable mining operations (Tr. 99-100). Witnesses testified that the White Rock No. 1 and Cuervo claims were mined prior to 1955. Mr. Rawls testified that he worked all of the claims before and during 1955 with

1/ United States v. Independent Quick Silver Co., 72 I.D. 367 (1965).

hand tools and produced approximately two tons of stone a day which he sold for from $5 to $10 a ton. Mr. Rawls testified that he has no information as to the amount of tonnage that has been shipped from the claims (Tr. 166). Nevertheless, the Forest Service mining engineer concluded that sufficient material had been removed from the Cuervo (Tr. 67), and the Railway geologist disagreed. On his income tax form for 1955, Mr. Rawls reported his occupation as stonemason and showed an income for the year of $493.56, which shows that there could not have been a significant mining operation by Mr. Rawls for that year on any of the claims.

The issue concerning the Cuervo and White Rock No. 1 claims is whether there was a present market shown for the common varieties of stone of widespread occurrence on each of these claims prior to July 23, 1955. The Hearing Examiner held that since the claims were being developed prior to this critical date, since a small business for stone did develop after Mr. Rawls acquired and installed a stone cutting machine about 1964-1965, since there was a market for stone similar to that on the Cuervo and White Rock No. 1 claims prior to 1955, and since an unknown, but insignificant, amount of stone was removed and sold from the claims prior to 1955, Mr. Rawls has shown that there was a present market for the material on these claims prior to the critical date. We do not agree that the evidence adduced at the hearing supports this finding. We agree that the Forest Service and Railway Company have not conclusively shown that there was no market for the material of the claims prior to July 23, 1955. The mining claimants have shown that they have marketed material since that date, but, even as to this later operation, they have not shown sufficient cost figures to establish that a prudent man would be willing to invest his money with a reasonable expectation of earning a profit. For example, the members of the family have been donating their labor without consideration of being paid a wage. In 1955 there was sufficient stone in the area so that not all of it was in demand to supply the market -- in fact, the market demand decreased in certain years. . . . In 1959-1960, the

> railroad constructed a track through the claims and thereby exposed considerable bedrock so that a comparison could then be made as to the quantity of overburden over the quantity of quality rock on the claims. The fact that the White Rock No. 1 claim was located in 1952, but nothing significant was done toward the development of the rock found thereon during the period prior to July 23, 1955, raises a presumption that the market value of the known minerals on the claims prior to July 23, 1955, was not sufficient to justify the expenditure required to extract and market them. (Citation omitted). The record does not show that the rock could have been sold at a profit prior to the critical date, and we are of the opinion that the subsequent development of the claims is not sufficient to overcome the presumption that, with the information known concerning the claims in 1955, the mining claimants did not consider themselves justified in attempting to capture a portion of the then existing market with a substantial amount of rock from these claims. . . . For the reasons stated, we find that the Hearing Examiner was in error in finding that the record supports a finding that deposits of rock from the White Rock No. 1 and Cuervo claims could have been marketed at a profit prior to July 23, 1955.

The facts here are similar to those in United States v. Frank and Wanita Melluzzo et al., supra, and United States v. E. A. Barrows and Esther Barrows, 76 I.D. 299 (1969), aff'd Barrows v. Hickel, 447 F. 2d 80 (9th Cir. 1971). These cases held that the sale of a minor quantity of material from a claim does not establish a discovery on a particular claim. In each case the evidence was confusing and inconsistent as to the amount of production.

Here Rawls testified that between 1954 and 1966 he paid off $21,000 in debts. Yet his income tax returns for 1955-1961 showed a very small return from the sale of a small amount of flagstone. He also stated the records had been lost for the early years of production. At a maximum, the amount of flagstone sold would cover the wages for the family. His income for the year of 1955 was only $493.56. United States v. Barrows, supra, where only one claim was involved, discusses the question of a small profit at 310, 311:

We do not believe a profit of as low as $245 per year would satisfy the prudent man test of discovery. It might be argued that Barrows' claim satisfied the marketability rule in a narrow sense in that material was sold from it at a profit. But this would be true if Barrows had sold only one truckload (3 yards) of sand and gravel per year at a profit of $10.50. It would be ridiculous to say this would have met the test of discovery. We have pointed out recently that the prudent man rule is the ultimate test of discovery, that the marketability test is but a refinement of it, and that although a claim may literally or technically satisfy the marketability test if it returns a minimal profit this will not satisfy the prudent man test if a prudent man would not invest his labor and means for such small profit. United States v. Frank and Wanita Melluzzo et al., 76 I.D. 181, 192 (1969).

Melluzzo, supra, held at 190, 191:

[A]ssuming the price was $12 per ton, this meant gross sales from each claim prior to July 23, 1955, of approximately $360 or about $51 per month.

We seriously doubt that production of no more than 4 1/2 tons of stone per month, little more than 2 or 3 truckloads, of a gross value of $51 is sufficient to meet the standard of discovery in the circumstances of this case. Melluzzo testified at the Call hearing that he paid his men $3 per ton to quarry and stock stone which he sold for $12 per ton. This would not include the use of his trucks, their operating costs, or other expenses properly allocable to his operation, such as the construction and maintenance of roads. His profit was therefore appreciably less than $9 per ton. (footnote omitted). He did say that the entire $9 per ton selling price was all profit when someone came and took his own stone. . . . But even so, it would appear that his profits, at a maximum, ran around $30 per month or $1 per day.

We do not believe that this operation satisfies the test of discovery . . . .

In affirming the Barrows case, supra, the Court held "The [Secretary's] opinion only pointed out that the quantity of material actually sold by appellant prior to the effective date of the 1955 Act was, in and of itself, too insubstantial to establish that a prudent man would have tried to develop the Grout Creek claim." Barrows v. United States, supra at 82.

This is the Rawls situation; they have not satisfied the marketability tests for the Cuervo and White Rock No. 1 claims.

On appeal Santa Fe and contestees raised essentially the same arguments presented before. As to Santa Fe, we have indicated our agreement with the Bureau of Land Management, which held that the Solicitor's Opinion, M-36421, supra, disposes of the contention that the land in the claims is not open to mineral entry.

The contestees seek support for their position in McClarty v. Udall, 404 F.2d 907 (9th Cir. 1969) and United States v. Barrows, supra. There is nothing in these cases contrary to our conclusions. In fact, as we have seen they strongly confirm them.

For the reasons given in it as amplified here, we conclude that the bureau's decision is correct.

As no purpose would be served by oral argument, the contestees' request for one is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision of the Bureau of Land Management is affirmed.

Martin Ritvo, Member

We concur:

Frederick Fishman, Member

Anne Poindexter Lewis, Member.